

Having reviewed the whole evidentiary record filed herein, the undersigned Board member makes the following findings of fact and conclusions of law:

Beth Ricketts began working part-time as a stocker/cashier for the respondent on January 5, 2004. The claimant's job duties consisted of stocking shelves, opening boxes and sacking groceries. Claimant agreed that she had intermittent back problems before going to work for respondent.

On March 6, 2006, the claimant injured her low and mid back while lifting stacked milk crates into a cart and then pushing the cart to a designated area in order to unload the crates onto a shelf. She experienced pain in her back that was different and a lot worse than what she had experienced.

Claimant sought treatment for her back pain and although she did not mention a specific injury she did note that she had to lift and carry a lot at her work for respondent.¹ The initial diagnosis was lumbar strain.

Claimant testified she talked to Scott Stanley, one of her bosses at respondent, on March 15, 2006, about her back injury.

Q. And what did you tell him?

A. I told him that I had hurt my back there last week.

Q. You hurt your back at Country Harvest?

A. Yes. I thought it was a pulled muscle. Pulled muscles usually go away and this was not going away. So I wanted to report it to him.

Q. What did you tell him exactly?

A. I don't really remember right at the moment. I asked him if he had an accident or injury report for me to fill out and he denied me it.

Q. When you say denied you, what did he do, just walk away or what?

A. No, he got very belligerent acting and said, "You think you are going to blame this on me. You are coming to me now about this?" And I told him I thought I just pulled a muscle and I'd been seeing the doctor and the doctors think it's a little bit more extensive than that.²

At the time of her injury, the claimant also worked as a bus driver for a school district and as a custodian for the American Legion. Her job duties for the American Legion included cleaning the hall as well as securing the building which took approximately two

¹ P.H. Trans., Cl. Ex. 4.

² Ricketts Depo. at 44-45.

hours to complete. But she noted her husband does the lifting custodial work for her. And she testified that she did not injure her back performing those part-time jobs.

It is well settled in this state that an accidental injury is compensable even where the accident only serves to aggravate or accelerate an existing disease or intensifies the affliction.³ The test is not whether the job-related activity or injury caused the condition but whether the job-related activity or injury aggravated or accelerated the condition.⁴

The claimant had intermittent problems with her low back for which she occasionally received treatment. After the March 6 through 8, 2006 stocking at work her pain increased and was different. There is some indication that a diskogram in 2006 showed a change from a previous diskogram in 2005. Based upon the record compiled to date, this Board member concludes that claimant has met her burden of proof to establish that she suffered accidental injury arising out of and in the course of her employment with respondent and affirms the ALJ's Order.

The respondent next argues the ALJ exceeded his jurisdiction awarding claimant temporary total disability compensation because claimant continued to perform part-time work for other employers.

The Board's jurisdiction to review preliminary hearing findings is statutorily created by K.S.A. 44-534a. The statute provides the Board may review those preliminary findings pertaining to the following: (1) whether the employee suffered an accidental injury; (2) whether the injury arose out of and in the course of the employee's employment; (3) whether notice was given or claim timely made; and (4) whether certain defenses apply. The Board also has jurisdiction to review preliminary hearing findings if it is alleged the ALJ exceeded the judge's jurisdiction.

Whether the ALJ should, in a given set of circumstances, authorize temporary total disability compensation is not a question that goes to the jurisdiction of the ALJ. K.S.A. 44-534a specifically grants an ALJ the authority to decide at a preliminary hearing issues concerning the payment of temporary total disability compensation. And although the evidence indicated claimant performed some part-time employment the ALJ apparently concluded that was not substantial gainful employment. Therefore, the ALJ did not exceed his jurisdiction. Accordingly, the Board does not have jurisdiction to address this issue at this juncture of the proceedings. When the record reveals a lack of jurisdiction, the Board's

³ *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984); *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978); *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976).

⁴ *Hanson v. Logan U.S.D.* 326, 28 Kan. App.2d 92, 11 P.3d 1184, *rev. denied* 270 Kan. 898 (2001); *Woodward v. Beech Aircraft Corp.*, 24 Kan. App.2d 510, 949 P.2d 1149 (1997).

authority extends no further than to dismiss the action.⁵ Accordingly, respondent and carrier's appeal of the ALJ's award of temporary total disability compensation is dismissed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁶ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2005 Supp. 44-551(b)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.⁷

WHEREFORE, it is the finding of this Board Member that the Order of Administrative Law Judge Bryce D. Benedict dated September 5, 2006, is affirmed.

IT IS SO ORDERED.

Dated this 22nd day of November 2006.

BOARD MEMBER

c: Roger D. Fincher, Attorney for Claimant
Matthew S. Crowley, Attorney for Respondent and its Insurance Carrier
Bryce D. Benedict, Administrative Law Judge

⁵ See *State v. Rios*, 19 Kan. App. 2d 350, Syl. ¶ 1, 869 P.2d 755 (1994).

⁶ K.S.A. 44-534a.

⁷ K.S.A. 2005 Supp. 44-555c(k).